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In the Supreme Court of the United States.

OCTOBER TERM, 1927.

No. 564.

MILTON E. SPRINGER, DALMACIO COSTAS, AND ANSELMO HILARIO,

Petitioners,

v.

THE GOVERNMENT OF THE PHILIPPINE ISLANDS,

Respondent.

No. 573.

GREGORIO AGONCILLO, BALDOMERO ROXAS, AND CATALINO LAVADIA,

Petitioners,

v.

THE GOVERNMENT OF THE PHILIPPINE ISLANDS,

Respondent.

ON PETITIONS FOR CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR RESPONDENT IN RESPONSE TO PETITIONS.

"BOARD OF CONTROL CASES."

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BRIEF FOR RESPONDENT IN RESPONSE TO PETITIONS.

"BOARD OF CONTROL CASES."

OPINIONS BELOW.

The opinion of the Supreme Court of the Philippine Islands in case No. 564, *supra*, Milton E. Springer, et al (the "National Coal Company case"), April 1, 1927, written by Mr. Justice

Malcolm and concurred in by Justices Street, Ostrand, Johns and Romualdez, together with the separate concurring opinion of Mr. Justice Johnson and the dissenting opinion of Chief Justice Avanceña and Justices Villamor and Villa-Real (Case 564, R. 62–113, 114–177, 178–202) is published in the Official Gazette of the Philippine Islands No. 56, May 10, 1927, pages 1232, *et seq.*, but has not yet appeared in the official "Philippine Reports."

In Case No. 573, *supra*, Gregorio Agoncillo, et al (the "Philippine National Bank case"), the opinion of the Insular Supreme Court, likewise of April 1, 1927, also by Mr. Justice Malcolm and concurred in by Justices Street, Ostrand, Johns and Romualdez, together with the separate concurring opinion of Mr. Justice Johnson and the dissenting opinion of Chief Justice Avanceña and Justices Villamor and Villa-Real (Case No. 573, R. 216–226, 227–261, 261–262) is likewise published in the Philippine Official Gazette No. 67, June 4, 1927, pages 1488, *et seq.*, but has not yet appeared in the Philippine Reports.

JURISDICTION.

These cases were both original petitions for *quo warranto* in the Supreme Court of the Philippine Islands. The final judgment of that court was entered in each case on April 11, 1927 (Case No. 564, R. 212–213; Case No. 573, R. 270). The petition for certiorari in case No. 564 was filed in this court on September 28, 1927; and, in Case No. 573, on October 1, 1927; in each case within less than six months after the entry of the final judgment below. Jurisdiction to grant the writs exists under Section 7 of the Act of February 13, 1925.

The Insular Supreme Court had original jurisdiction under Section 26 of the Organic Act (*infra*, p. 13) and Sections 197 and 204 of the Philippine Code of Civil Procedure.

THE QUESTIONS.

1. Under the Organic Act, may the Philippine Legislature place the voting power of Government owned stock in corporations of those Islands, in which the Philippine Government owns more than a majority of the capital stock (Philippine

National Bank; National Coal Company), in the hands of a committee, named by the Legislature, a majority of whom are members and officers of the Legislature itself;—("Committee" for the Coal Company; "Board of Control" for the Bank), composed of the Governor General, the President of the Philippine Senate, and the Speaker of the Philippine House of Representatives?

2. Specifically, are the provisions to that effect, contained in Section 4 of the National Coal Company charter (Act No. 2705, *infra*, p. 3) and in Section 4 of the charter of the Philippine National Bank as amended (Act No. 2938 amending Act No. 2612 as theretofore amended by Act No. 2747, *infra*, p. 6), valid?

STATUTES INVOLVED.

PHILIPPINES.

NATIONAL COAL COMPANY. CHARTER.

Act No. 2705, approved March 10, 1917.

> "SEC. 4. The Governor General on behalf of the Government of the Philippine Islands shall subscribe for fifty-one per centum of said capital stock and the remainder shall be offered to the public * * *. The voting power of all such stock owned by the Government of the Philippine Islands shall be vested exclusively in a committee consisting of the Governor General, the President of the Senate, and the Speaker of the House of Representatives."
>
> "SEC. 6." (Appropriates 1,530,000 pesos for investment in the stock.)

Act No. 2822, amending Sections 2, 4, and 6 of the preceding Act (No. 2612); approved March 5, 1919.

> "SEC. 2." (Directs the Governor General to subscribe for "*at least* fifty-one per centum of said capital stock"; instead of for exactly 51% as originally provided.)

Act No. 2612, February 4, 1916.

"SEC. 3." (Fixes capital at 20,000,000 pesos; 200,000 shares; 100 pesos per share.)

"SEC. 4." The Government of the Philippine Islands not later than January thirty-first, nineteen hundred and seventeen, shall purchase one hundred and one thousand shares at par of the said National Bank, the payment for said shares of the Government to be made as hereinafter provided. Ninety-nine thousand shares of said capital stock shall be offered to the public at par as hereinafter provided."

"SEC. 5." (Appropriates for the payment of Government shares, 1,300,000 pesos out of general funds of the Insular Treasury, and the further sums of 1,000,000 pesos on or before July 31, 1916, and 1,000,000 pesos on or before January 31, 1917, "which shall be invested from the insurance fund created by Act No. 1728, the public works bonds sinking fund created by Act No. 1729, and the friar lands bonds sinking fund created by Act No. 2550"), * * * "*And provided further*, That the voting power of all stock purchased directly by the Philippine Government as an investment from the general funds of the Government and the voting power of all stock purchased for the benefit of the insurance fund, of the public works bonds sinking fund, and of the friar lands bonds sinking fund, shall be vested exclusively in the Governor General."

"SEC. 20. The affairs and business of the National Bank shall be managed by a board of directors consisting of the president of the Bank, who shall be chief executive thereof and chairman of the board at the same time, one vice president who shall assist the president and act in his stead in case of absence or incapacity, and five members elected as hereinafter provided. * * *."

"SEC. 21. The president and vice president shall be appointed by the Governor General, by and with the consent of the upper house of the Philippine Legislature, and may be removed for cause by said Governor General, by and with the consent of the said house. The five remaining members shall be elected and may be removed

in accordance with the provisions of Act No. 1459, the Corporation Law."

"SEC. 25. The Attorney General of the Philippine Islands shall be attorney for the said National Bank; * * *."

"SEC. 26. The Insular Auditor shall be *ex officio* auditor of the National Bank. * * *."

"SEC. 47. All profits assigned as dividends to the shares of the Government shall be paid into the Insular Treasury for the general funds thereof and shall be available for any appropriation."

Act No. 2747. An act to amend in certain particulars Act No. 2612, entitled "An Act Creating the Philippine National Bank"; approved February 20, 1918.

"SEC. 4." * * * "The voting power of all the stock of the National Bank owned and controlled by the Government of the Philippine Islands shall be vested exclusively in a committee consisting of the Governor General, the President of the Senate, and the Speaker of the House of Representatives."

"SEC. 5." (Amends Section 5, *inter alia*, by striking out the original provision which had placed in the Governor General the voting power of the Government stock.)

Act No. 2938. An act to amend Act No. 2612, entitled "An Act creating the Philippine National Bank," as amended by Act No. 2747. Approved January 30, 1921.

"SEC. 3." (Increases Bank's capital from 20,000,000 pesos to 50,000,000 pesos by a new "second" issue of 300,000 shares.)

"SEC. 4. The Government of the Philippine Islands not later than June 30, 1921, shall purchase all remaining shares of the first issue and part of those of the second issue to the aggregate number of not less than one hundred and fifty-three thousand, at par, the payment for said shares of the Government to be made as hereinafter provided. The remaining shares may be offered to the

provincial and municipal governments or to the public at a price not below par which the board of directors of the said bank shall from time to time determine: *Provided*, That the Government of the Philippine Islands upon agreement with the board of directors of the bank, may at any time after June 30, 1921, purchase all or part of the stock on hand at a price not below par.

"The voting power of all the stock of the National Bank owned and controlled by the Government of the Philippine Islands shall be vested exclusively in a board the short title of which shall be **"Board of Control,"** composed of the Governor General, the President of the Senate, and the Speaker of the House of Representatives."

"SEC. 5. There are hereby appropriated out of any funds in the Insular Treasury not otherwise appropriated, such sums as may be necessary for the payment of the shares to be purchased by the Government of the Philippine Islands: *Provided*, That the capital and surplus of the Agricultural Bank of the Philippine Islands shall be applied primarily to said payment: *And provided further*, That no sum shall be set up on the books of the Auditor until it shall be necessary to make the payment or payments authorized by this Act."

"SEC. 8. At no time shall shares be sold to the public, if, as a result thereof, the part of the capital stock held by private investors will equal or exceed the part owned by the Government of the Philippine Islands."

"SEC. 10. Said National Bank is hereby authorized:

* * * * *

(*f*) To invest a sum not exceeding ten per cent of its paid up capital in the purchase of shares of stock of any banking corporation constituted under the laws of any State of the United States and to hold the same: *Provided, however*, That, subject to resolution of the board of directors **and the approval of the Board of Control,** it may incorporate any of its foreign agencies now or hereafter established, under the laws of the country or estate" (State) "where the same may be located, and may retain the stock of such corporation as an investment."

"SEC. 14. Said National Bank is hereby authorized to issue circulating notes * * * *Provided, however*, That in case of emergency, and **subject to the approval**

of the Board of Control, the Secretary of Finance may authorize the National Bank to rediscount commercial paper of not over six months' maturity secured by exports or imports, and may issue against said commercial paper circulating notes * * *.

"SEC. 16. (Increases number of directors to nine.)

"SEC. 17. (Directors to elect president and vice-president from amongst themselves.)

"SEC. 18. The orders and resolutions of the board of directors shall be carried out by a general manager who shall be chief executive of the bank and shall be paid an annual salary to be fixed by the board of directors, **with the approval of the board of control,** and an assistant general manager who * * * shall be paid a salary to be fixed by the board of directors, **with the approval of the board of control.** The general manager shall be appointed by the board of directors, **with the advice and consent of the board of control,** and may be removed in a like manner."

"SEC. 21. The Secretary of Justice shall be attorney for said National Bank * * *."

"SEC. 22. The Insular Auditor shall be *ex officio* auditor of the National Bank and shall, **with the advice and consent of the board of control,** appoint a representative who shall be chief of the auditing department of the bank. All the other employees of the department shall be appointed by the Insular Auditor who, **with the approval of the board of control,** shall fix the salaries of the same as well as that of his representative, the chief of the department. * * * The representative of the Insural Auditor shall make a quarterly report on the condition of the bank to the Governor General of the Philippine Islands, to the Secretary of Finance, **to the Board of Control,** to the Insular Auditor, and to the board of directors of said bank. * * *."

"SEC. 23. All the other officers and employees of the National Bank shall be appointed and removed by the Board of Directors on recommendation of the general manager. Said officers and employees shall not be subject to the Civil Service Law, and their duties and compensations shall be fixed by the general manager, with the approval of the board of directors: *Provided, further,*

That whenever the president or vice-president, by order of the Board of Directors, shall temporarily or permanently perform duties incumbent upon other officers or employees, they may be granted compensation additional to the bonus fixed by this Act for the president and vice president; **but the resolution of said board shall not take effect until the written approval of the members of the Board of Control has been obtained.** The orders of said board of directors in this respect may be modified or repealed at any time, **provided they are approved in each case by the Board of Control.**

"SEC. 24. The board of directors may require the officers and employees in the bank and its branches, before entering upon the performance of their duties, to furnish a fidelity bond for the benefit of the bank, in the form and amount prescribed by the said board of directors. For this purpose, and for this purpose alone, all officers and employees of whom a bond is required shall be deemed public officers and employees, respectively, and the provisions of the Public Bonding Law, Chapter 15 of the Administrative Code, are hereby made applicable to the same."

"SEC. 38. All profits assigned as dividends to the shares of the Government shall be paid into the Insular Treasury, for the general funds thereof."

"SEC. 44. The National Bank shall at all times keep on hand * * * a sum in lawful money * * * computed as follows:

Twenty-five per cent of the circulating notes outstanding, * * *.

Twenty per cent of the demand deposits outstanding * * *: *Provided, however,* That the Secretary of Finance at the request of the board of directors of the bank, **duly approved by the Board of Control,** whenever in his judgment the general interests of the country require it, shall be authorized to suspend for such period as may be necessary, the requirement of maintaining the proportion of the reserve specified in this Act. * * *."

"SEC. 45. The National Bank is hereby authorized to guarantee * * * bonds issued by duly incorporated companies for the erection of and addition or additions to industrial plants or manufactories principally

used for the manufacture and preparation of the products of the Philippine Islands: Provided, however, That **such guarantee shall only be lawful when approved by the Board of Control.**

Subject to the same approval, the National Bank is hereby authorized to purchase bonds issued by any duly incorporated company engaged in the manufacture or preparation of products in the Philippine Islands. * * *."

Analogous statutes charter the National Petroleum Company (Act No. 2814), the National Development Company (Act No. 2849), the National Cement Company (Act No. 2855), and the National Iron Company (Act No. 2862).

GENERAL CORPORATION LAW

Act No. 1459, the "Corporation Law," approved by the Philippine Commission March 1, 1906.

"SEC. 34. Directors of the corporation may be removed from office by vote of two-thirds of the members entitled to vote, or if the corporation be a stock corporation, by a vote of the stockholders holding or representing two-thirds of the subscribed capital stock entitled to vote: *Provided, however,* That such removal shall take place either at a regular meeting of the corporation or at a special meeting called for the purpose, * * *."

"OFFICER."—DEFINITION OF.

"Any person who, by direct provision of law, by popular election or appointment by competent authority, shall take part in the performance of duties in the public service shall be deemed a public officer."

Art. 401, Penal Code of the Philippine Islands.

" 'Officer,' as distinguished from 'clerk' or 'employee,' refers to those officials whose duties, not being of a clerical or manual nature, may be considered to involve the

exercise of discretion in the performance of the functions of government, whether such duties are precisely defined by law or not.

'Officer,' when used with reference to a person having authority to do a particular act or perform a particular function in the exercise of governmental power, shall include any government employee, agent or body having authority to do the act or exercise the function in question."

SEC. 2, Philippine Revised Administrative Code of 1917 (Act No. 2711), Pars. 10 and 11 (pp. 6–7).

UNITED STATES.

"Spooner Amendment." Act of March 2, 1901 (ch. 803; 31 Stat. 895, 910).

"All military, civil and judicial powers necessary to govern the Philippine Islands acquired from Spain by the treaties concluded at Paris on the tenth day of December, eighteen hundred and ninety-eight, and at Washington on the seventh day of November, nineteen hundred, shall, until otherwise provided by Congress, be vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct, for the establishment of civil government and for maintaining and protecting the inhabitants of said Islands in the free enjoyment of their liberty, property and religion."

Executive order of the President organizing civil government, June 21, 1901 (Appendix "A", *infra*, p. 35).

"On and after the fourth day of July, nineteen hundred and one, and until it shall be otherwise ordered, the President of the Philippine Commission will exercise the executive authority in all civil affairs in the government of the Philippine Islands heretofore exercised in such affairs by the Military Governor of the Philippines, and to that end the Hon. William H. Taft, President of the said Commission, is hereby appointed Civil Governor of the Philippine Islands. * * *

"The power to appoint civil officers, heretofore vested in the Philippine Commission, or in the Military Governor, will be exercised by the Civil Governor, with the advice and consent of the Commission."

Act of July 1, 1902, "An Act Temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes" (Sec. 1, ch. 1369, 32 Stat. 691).

> "Be it enacted * * * That the action of the President of the United States in creating the Philippine Commission and authorizing said Commission to exercise the powers of government to the extent and in the manner and form and subject to the regulation and control set forth in the instructions of the President to the Philippine Commission, dated April 7, 1900, and in creating the offices of Civil Governor and Vice Governor of the Philippine Islands, and authorizing said Civil Governor and Vice Governor to exercise the powers of government to the extent and in the manner and form set forth in the Executive Order dated June twenty-first, nineteen hundred and one, * * * is hereby approved, ratified and confirmed, and until otherwise provided by law the said Islands shall continue to be governed as thereby and herein provided, * * *."

Act of February 6, 1905, amending the Act of July 1, 1902 (Sec. 8, ch. 453; 33 Stat. 689, 692).

> "Sec. 8. That the Civil Governor of the Philippine Islands shall hereafter be known as the Governor General of the Philippine Islands."

Organic Act, "Jones Law," approved August 29, 1916 (ch. 416; 39 Stat. 545, *et seq.*).

> "SEC. 21. That the supreme executive power shall be vested in an executive officer, whose official title shall be 'The Governor General of the Philippine Islands', * * *. He shall, unless otherwise herein provided, appoint, by and with the consent of the Philippine Senate, such officers as may now be appointed by the Governor General, or such as he is authorized by this Act to appoint, or whom he may hereafter be authorized by law to appoint: * * * He shall have general supervision and control of all of the departments and bureaus of the Government of the Philippine Islands so far as is not inconsistent with the provisions of this Act, * * *. He shall commission all officers that he may be authorized to appoint. He shall be responsible for the faithful execution

of the laws of the Philippine Islands and of the United States operative within the Philippine Islands, * * *."

"SEC. 22. That, except as provided otherwise in this Act, the executive departments of the Philippine Government shall continue as now authorized by law until otherwise provided by the Philippine Legislature. * * * The Philippine Legislature * * * shall provide for the appointment and removal of the heads of the executive departments by the Governor General: *Provided*, That all executive functions of the Government must be directly under the Governor General or within one of the executive departments under the supervision and control of the Governor General * * *."

"SEC. 8. That general legislative power, except as otherwise herein provided, is hereby granted to the Philippine Legislature, authorized by this Act."

"SEC. 12. That general legislative powers in the Philippines, except as herein otherwise provided, shall be vested in a legislature which shall consist of two houses, one the Senate and the other the House of Representatives, and the two houses shall be designated 'The Philippine Legislature': * * *."

"SEC. 18. That * * *. Both houses shall convene at the capital * * * and organize by the election of a Speaker or a presiding officer, a clerk, and a sergeant at arms for each house, and such other officers and assistants as may be required. * * *."

"No Senator or Representative shall, during the time for which he may have been elected, be eligible to any office the election to which is vested in the Legislature, nor shall be appointed to any office of trust or profit which shall have been created or the emoluments of which shall have been increased during such term."

"SEC. 19. That * * *.

"All laws enacted by the Philippine Legislature shall be reported to the Congress of the United States, which hereby reserves the power and authority to annul the same. * * *."

"SEC. 20. That at the first meeting of the Philippine Legislature created by this Act and triennially thereafter there shall be chosen by the Legislature two Resident Commissioners to the United States, * * *."

"SEC. 26. That the Supreme Court and the Courts of First Instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided and such additional jurisdiction as shall hereafter be prescribed by law. * * *."

GOVERNOR GENERAL'S EXECUTIVE ORDER

Executive Order No. 37, Philippine Official Gazette, Vol. XXIV, No. 135, November 11, 1926, p. 2419.

"Office of the Governor General of
the Philippine Islands.
Manila, November 9, 1926.

"Whereas it is held in an opinion of the Judge Advocate General of the United States Army, confirmed by an opinion of the Attorney General of the United States, received at the office of the Executive, November seventh, nineteen hundred and twenty-six, that the provisions of the statutes passed by the Philippine Legislature creating a 'Board of Control' or 'Committee' and enumerating the duties and powers thereof, with respect to certain corporations in which the Insular Government is the owner of stock, are nullities; that the remaining portions of said statutes are valid; that the duties imposed by said statutes upon said Board or Committee are executive in their nature, and subject to the provisions of the Organic Act relating to the executive functions; that said executive duties and powers may be performed as in other cases not specifically provided for by law.

"Now, therefore, acting under authority of said opinions, the duties and powers heretofore exercised by said 'Board of Control' or 'Committee' shall, from and after this date, be exercised solely by the Governor-General pursuant to the executive power vested in him by the Organic Act."

"LEONARD WOOD,
Governor-General."

STATEMENT OF THE CASES.

Coal Company. Act No. 2705 of the Philippine Legislature, March 10, 1917, chartered the National Coal Company to develop the coal deposits of the Philippine Islands, fixing its capital stock at 3,000,000 pesos, directing the Governor General to subscribe for 51% of the stock on behalf of the Philippine Government, and appropriating 1,530,000 pesos for that purpose. It was further provided (*supra*, p. 3):

> "SEC. 4. * * *. The voting power of all such stock owned by the Government of the Philippine Islands shall be vested exclusively in a committee consisting of the Governor General, the President of the Senate, and the Speaker of the House of Representatives."

Afterwards, March 5, 1919, by Act No. 2822 (*supra*, p. 3) the charter was amended, *inter alia*, by directing the Governor General to subscribe on behalf of the Government for "*at least* fifty-one per centum of the capital stock" (instead of for exactly 51% as originally provided) and appropriating "such sum as may be necessary" to pay for the Government stock. The Government has in fact acquired and held on December 6, 1926, 29,809 shares out of the total of 30,000 shares then outstanding,—that is to say, all but 191 shares of the issued stock.

National Bank. By Act No. 2612, February 4, 1916 (*supra*, p. 4) the Philippine National Bank was chartered with an authorized capital of 200,000 shares (20,000,000 pesos) of which the Government was to purchase 101,000 shares to be paid for partly out of general funds in the Insular Treasury, partly from the public insurance fund, the public works bonds sinking fund, and the friar lands bonds sinking fund; and partly by the transfer of the assets of the "Agricultural Bank" (Secs. 3, 4, 5 and 6, Act 2612). The voting power of the Government stock was placed in the hands of the Governor General (*ib.* Sec. 5, *supra*, p. 4); and there was also placed in his hands the direct appointment, "by and with the consent of the Upper House of the Philippine Legislature," and the removal with like consent, of the president and vice president of the Bank; and the bank president was to be "chief executive

thereof and chairman of the board at the same time"; the other five directors to be elected by the stockholders in accordance with the general corporation law (*ib.* Secs. 20 and 21, *supra*, pp. 4–5). Afterwards, February 20, 1918, by Act No. 2747 (*supra*, p. 5), the bank charter was amended, *inter alia*, by depriving the Governor General of the voting power of the Government owned stock, and providing that it

> "shall be vested exclusively in a committee consisting of the Governor General, the President of the Senate and the Speaker of the House of Representatives" (*ib.* Secs. 4 and 5, *supra*, p. 5).

Later on, the charter was again amended, January 30, 1921, by Act No. 2938 (*supra*, pp. 5–9), providing *inter alia*, for the increase of the capital to 50,000,000 pesos by a new "second" issue of 300,000 shares; that the Government should purchase all the remaining shares of the first issue, and not less than 153,000 shares of the second issue; and that:

> "SEC. 8. At no time shall shares be sold to the public, if, as a result thereof, the part of the capital stock held by private investors will equal or exceed the part owned by the Government of the Philippine Islands";

appropriating the necessary funds for the purchase of the stock out of general funds of the Insular Treasury; and further providing that (*ib.* Sec. 4, *supra*, p. 6):

> "The voting power of all the stock of the National Bank owned and controlled by the Government of the Philippine Islands shall be vested exclusively in a board, the short title of which shall be 'Board of Control', composed of the Governor General, the President of the Senate, and the Speaker of the House of Representatives."

The appointment of the president and vice president of the bank was taken from the Governor General, by the provision that they should be elected by the directors from amongst themselves (*ib.* Sec. 17); and the president was no longer to be the bank's chief executive, it being provided that (*supra*, p. 7):

> "SEC. 18. The orders and resolutions of the board of directors shall be carried out by a *general manager who*

> *shall be chief executive of the bank* and shall be paid an annual salary to be fixed by the board of directors, *with the approval of the Board of Control*, and an assistant general manager who * * * shall be paid a salary to be fixed by the board of directors, *with the approval of the Board of Control.* The general manager shall be appointed by the board of directors, *with the advice and consent of the Board of Control*, and may be removed in like manner." (*italics ours*)

Further, that the chief of the auditing department of the bank should be appointed by the Insular Auditor "with the advice and consent of the Board of Control," and that all other employees of the auditing department of the bank should also be appointed by the Insular Auditor, and that the salaries both of the chief of the auditing department and that of the subordinates of that department should be fixed by the Insular Auditor likewise "with the approval of the Board of Control" (*ib.* Sec. 22, *supra*, p. 7).

The "Board of Control" was also given further important administrative duties in the management of the bank (*ib.* Secs. 10, 14, 23, 24, 45, *supra*, pp. 6–9); so that it was not to be simply a "committee" to vote the Government owned stock in the bank; but was to be really, as its name indicated, a "Board of Control" of the bank.

The Government in fact acquired practically all of the bank's issued capital stock, so that on January 17, 1927, there were registered in its name 97,332 shares out of the total of 100,000 shares then outstanding (Case 573, R. 9–10), and but 2,668 shares were then registered in the names of private persons.

Since the formation of the Coal Company in 1917, and since the first amendment to the charter of the Bank by Act No. 2747, *supra*, in 1918, the voting power of the Government owned stock in the Coal Company and in the Bank, respectively, had been exercised by the "Committee" of three composed of the Governor General, the President of the Senate, and the Speaker of the House of Representatives, in accordance with the provisions of those acts (and, as to the Bank, since the second amendatory act No. 2938 of January 30, 1921, by the same three officials acting under the title of "Board of Control").

But on November 9, 1926, Governor General Wood promulgated his "Executive Order No. 37" (*supra*, p. 13), reciting the opinion of The Judge Advocate General of the Army (Appendix C, *infra*, pp. 43–53), "confirmed by an opinion of the Attorney General of the United States" (Appendix B, *infra*, pp. 36–42), and thereupon proclaiming that:

> "acting under authority of said opinions, the duties and powers heretofore exercised by said 'Board of Control' or 'Committee' shall, from and after this date, be exercised solely by the Governor General pursuant to the executive power vested in him by the Organic Act."

Special meetings of the stockholders of the Coal Company and of the Bank were called for the purpose of electing new directors. That of the Coal Company met December 6, 1926 (Case 564, "Exhibit C" to original "complaint", R. 31 *et seq.*). The Governor General attempted to vote the Government stock in favor of certain candidates named by him, but the chairman of the meeting refused to accept the Governor General's ballot, and, holding himself bound by the provisions of Act No. 2705, as "the corporate charter to which the National Coal Company owes its very existence" (Case 564, R. 41–42), ruled that he must accept the ballot tendered by the Honorable Manuel L. Quezon, President of the Senate, and the Honorable Manuel Roxas, Speaker of the House of Representatives, in their capacity as representing the "Committee" (they being the majority thereof and having held a formal meeting of the "Committee" half an hour before the stockholders' meeting, which meeting the Governor General had declined to attend; Case 564, "Exhibit B" to "Complaint," R. 22–31). The ballot, so cast by the majority of the Committee over the protest of the Governor General, elected among others the three petitioners here in Case No. 564, Milton E. Springer, Dalmacio Costas and Anselmo Hilario, as three of the directors of the Coal Company. (The other two candidates for whom the committee ballot was cast were also named on the Governor General's ballot; and were, therefore, unquestionably elected, whichever ballot should have been received).

The special meeting of the Bank's stockholders met January 17, 1927, pursuant to a call ordered by the board of directors December 28, 1926, upon the request of the Governor General,

> "purporting to have been made by him on behalf of the Government of the Philippine Islands as the owner of 97,332 shares of the stock of this corporation and by five other stockholders holding nine shares."

Claiming, as the majority of the Board of Control, to control the voting of the Government stock and the right to say whether or not the special stockholders' meeting should be called, as at the request of the Government as majority stockholder, the President of the Senate and the Speaker of the House, majority members of the Board of Control, declined to recognize the validity of the special meeting, and did not attend it. In their absence the president of the bank, presiding as chairman, ruled that no quorum was present; since

> "Section 4 of the Act of 2938, which constitutes the corporate charter of this bank prescribes that the voting power of all the stock of this bank owned and controlled by the Government"

should be vested exclusively in the Board of Control, and that the bank's By-Laws, acted upon by the stockholders for several years, were in accordance with that statute. Accordingly, he declared the meeting adjourned for lack of a quorum (Case 573, R. 18–27). Thereupon the stockholders present, refusing to acquiesce in that ruling, organized themselves by the election of an acting chairman of the meeting and a secretary *pro tempore*, and proceeded with the meeting, there being present or represented the 97,332 shares of Government owned stock represented by the Governor General, and 81 other shares represented by the owners in person,—a total of 97,413 shares, out of the total 100,000 shares of stock outstanding (Case 573, R. 100). The meeting proceeded, by unanimous vote of the 97,413 shares of stock, to remove the petitioners here, Gregorio Agoncillo, Baldomero Roxas and Catalino Lavadia, as directors of the bank, and to elect others in their places, and also to elect a fourth director to fill an existing vacancy (Case 573, R. 95–105).

Afterwards, in the case of each corporation, the directors claiming to have been elected by the ballots of the Governor General representing the Government owned stock at the respective stockholders' meetings, demanded recognition as directors of the Coal Company and of the Bank, respectively; which was refused in each instance by the president and the administrative authorities of the Coal Company and of the Bank. Thereupon these petitions for *quo warranto* were filed under the provisions of Section 197 of the Insular Code of Civil Procedure.

The actions were brought as original actions in the Insular Supreme Court under the authority of Section 204 of the Insular Code of Civil Procedure, praying in the Coal Company case for the ousting of the defendants (petitioners here) Milton E. Springer, Dalmacio Costas, and Anselmo Hilario, who had been declared elected directors at the special stockholders' meeting upon the ballot of the majority members of the "Committee" (President of the Senate and Speaker of the House) in opposition to the ballot for other candidates presented by the Governor General (Case 564, R. 2–14); and in the Bank case for the ousting as directors of the defendants (petitioners here), Gregorio Agoncillo, Baldomero Roxas and Catalino Lavadia, who had been removed at the special stockholders' meeting (after its attempted adjournment by the president of the bank and its reconvening by the stockholders present, as above stated) by the Governor General's ballot of the Government owned stock, and for the induction into office in their stead as directors of the bank of the persons elected at that stockholders' meeting by the ballot of the Governor General and the other stockholders then present, viz., Leon M. Heras, Manual Yriarte, John Gordon and A. Gideon (Case 573, R. 1–17).

The Insular Supreme Court in each case sustained the contention of the Governor General, and judgments were entered in accordance with the prayers of the compaints (Case 564, R. 212–213; Case 573, R. 270).

POSITION OF THE INSULAR GOVERNMENT.

In view of the importance to the people of the Philippine Islands of the questions here involved, it is believed that respondent ought not actively to contend against their review by this court.

But, in order that the court may be fully advised before determining whether to exercise its extraordinary jurisdiction by certiorari, the following is submitted:

The only substantial "reasons for the allowance of the writ" urged by the petitioners are:

(1) Their claim that an important Federal question of the construction of the Organic Act is involved; and

(2) That the Insular Supreme Court failed to follow or give force or effect to applicable decisions of this court (Reasons "1", "2", "3"; p. 5, Petition, Case No. 564; pp. 11–12, Petition, Case No. 573).

The other "reasons" assigned ("4" and "5"; pp. 5–6, Petition, Case No. 564; p. 12, Petition, Case No. 573) merely state that the decision below was by a divided court on a question which should be finally adjudged by this court, and that a full consideration by this court "will tend to prevent costly and undesirable litigation, and promote justice to all concerned."

Respondent submits, to the contrary, that:

(1) The Insular Supreme Court did not fail to follow or give force or effect to any applicable rulings of this court. Its judgments follow the applicable decisions of this court.

(2) No substantial Federal question is presented which is not already foreclosed by the rulings of this court.

Therefore, important as these cases are to the Philippine Government, no reason appears for the exercise of the extraordinary jurisdiction of this court to review them by certiorari. A full review would necessarily result in affirmance of the judgments below, and would only delay the final settlement of the questions at issue.

ARGUMENT

POINT I.

Membership in the committee in question ("Committee" for the Coal Company; "Board of Control" for the Bank) is a "civil office".

A.—IT IS NOT LACKING IN THE ESSENTIAL ELEMENTS OF SUCH OFFICE, VIZ., "a public station, permanent in character, created by law, whose incidents and duties were prescribed by law" (Opinion of the Court Below, Case No. 564, R. 98–99).

Metcalf & Eddy v. *Mitchell*, 269 U. S. 514, 520 (STONE J.).
United States v. *Hartwell*, 6 Wall. 385, 393 (SWAYNE, J.).
United States, v. *Maurice*, 2 Brock. 96; Fed. Cas. No. 15747 (MARSHALL, J.).
State v. *Stanley*, 66 No. Car. 60, 63–68; 8 Am. Rep. 488, 489–493.
Howerton v. *Tate*, 68 No. Car. 546, 548.

B.—IT IS LIKEWISE AN "OFFICE" WITHIN THE STATUTORY DEFINITIONS OF THE PHILIPPINE CODES:

"Any person who, by direct provision of law, by popular election or appointment by competent authority, shall take part in the performance of duties in the public service shall be deemed a public officer."

Art. 401, Penal Code of the Philippine Islands. (*supra*, *p.* 9.)

"'Officer', * * *, refers to those officials whose duties, * * * may be considered to involve the exercise of discretion in the performance of the functions of government, whether such duties are precisely defined by law or not.

'Officer', * * * shall include any government employee, agent or body having authority to do the act or exercise the function in question."

SEC. 2, Philippine Revised Administrative Code of 1917 (Act No. 2711), Pars. 10 and 11 (pp. 6–7). (*supra*, pp. 9–10.)

POINT II.

Therefore, appointment to such "Committee" or "Board of Control" must be by the Governor General; since

1. APPOINTMENT TO CIVIL OFFICE IS AN EXECUTIVE FUNCTION.

Myers v. *United States*, 272 U. S. 52, 115–118;

> "The vesting of the executive power in the President was essentially a grant of the power to execute the laws. * * * As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. * * * It was urged that the natural meaning of the term 'executive power' granted the President included the appointment and removal of executive subordinates. If such appointments and removals were not an exercise of the executive power, what were they? They certainly were not the exercise of legislative or judicial power in government as usually understood.
>
> "It is quite true that, in State and colonial governments at the time of the Constitutional Convention, power to make appointments and removals had sometimes been lodged in the legislatures or in the courts, but such a disposition of it was really vesting a part of the executive power in another branch of the Government."
>
> *Myers* v. *United States, supra*, 272 U. S. 52, 117–118 (TAFT, CH. J.).

And, under the Philippine Organic Act,

> "The supreme executive power shall be vested in * * * 'The Governor General of the Philippine Islands'" (Sec. 21; 39 Stat. 552);

which is a grant of exclusive ececutive power, and is not merely the naming of a department of the Government.

Myers v. *United States, supra*, 272 U. S. 52, 151.

Furthermore, in the Philippine Organic Act, this general grant of supreme executive power to the Governor General is strengthened and made more specific by the additional provisions that:

"He shall, unless otherwise herein provided, appoint, by and with the consent of the Philippine Senate, such officers as may now be appointed by the Governor General, * * * or he may hereafter be authorized by law to appoint; * * *. He shall have general supervision and control of all of the departments and bureaus of the Government of the Philippine Islands so far as it is not inconsistent with the provisions of this Act, * * *. He shall commission all officers that he may be authorized to appoint. He shall be responsible for the faithful execution of the laws of the Philippine Islands and of the United States operative within the Philippine Islands, * * *." (Sec. 21, *supra;* 39 Stat. 552.)

"The Philippine Legislature * * * shall provide for the appointment and removal of the heads of the executive departments by the Governor General: *Provided,* That all executive functions of the Government must be directly under the Governor General or within one of the executive departments under the supervision and control of the Governor General." (Sec. 22; 39 Stat. 553.)

2. THE ORGANIC ACT, BY POSITIVE DIRECTION, VESTS THE GOVERNOR GENERAL WITH THE POWER OF APPOINTMENT OF ALL CIVIL OFFICERS "BY AND WITH THE CONSENT OF THE PHILIPPINE SENATE," WHOSE APPOINTMENT IS NOT THEREIN OTHERWISE PROVIDED FOR.

"He shall, unless otherwise herein provided, appoint, by and with the consent of the Philippine Senate, such officers as may now be appointed by the Governor General." (Organic Act, Sec. 21, *supra;* 39 Stat. 552.)

The Executive Order of the President, June 21, 1901 (*supra,* p. 10), issued pursuant to the authority given the President by the "Spooner Amendment" of March 2, 1901 (31 Stat. 910; *supra,* p. 10), provided:

"*The power to appoint civil officers* heretofore vested in the Philippine Commission, or in the Military Governor, *will be exercised by the Civil Governor* with the advice and consent of the Commission." (*italics ours.*)

That power to appoint "civil officers" was ratified and continued in effect by Section 1 of the Act of July 1, 1902 (39 Stat. 691; *supra,* p. 11), providing that

"the action of the President of the United States * * * in creating the offices of Civil Governor and

> Vice Governor of the Philippine Islands and authorizing said Civil Governor and Vice Governor to exercise the powers of government to the extent and in the manner and form set forth in the Executive Order dated June 21, 1901 * * * is hereby approved, ratified, and confirmed, and until otherwise provided by law the said Islands shall continue to be governed as thereby and herein provided, * * *."

And was in turn further continued in effect (the title "Civil Governor" having been in the meantime changed to "The Governor General of the Philippine Islands"; Act of Feb. 6, 1905, Sec. 8; 33 Stat. 692) by the provision above quoted from Section 21 of the present Organic Act, "Jones Law" (39 Stat. 552, *supra*), that the Governor General shall, unless therein otherwise provided,

> "appoint * * * such officers as may now be appointed by the Governor General":—

the only change being the insertion of the qualification that such appointments shall be made "by and with the consent of the Philippine Senate."

3. THEREFORE, APPOINTMENTS TO CIVIL OFFICE IN THE PHILIPPINES (NOT OTHERWISE EXPRESSLY PROVIDED FOR IN THE ORGANIC ACT) ARE VESTED SOLELY IN THE GOVERNOR GENERAL AS THE SUPREME EXECUTIVE POWER IN THE ISLANDS; because (1) such appointment is an executive function and part of the supreme executive power granted him by the Organic Act, and (2) such power of appointment is expressly granted to him by the provision of Section 21 of the Organic Act continuing in force the power theretofore exercised by him under the grant originally given by the Presidential Order of June 21, 1901, and continued in effect by the Act of July 1, 1902.

POINT III.

If appointment to such an office ("Committee", "Board of Control") could properly be vested in the Legislature, then neither the President of the Senate nor the Speaker of the House would be eligible thereto.

> "No Senator or Representative shall, during the time for which he may have been elected, be eligible to any office the election to which is vested in the Legislature." (Sec. 18, last paragraph; Organic Act, 39 Stat. 551; *supra*, p. 12).

POINT IV.

But even if membership in the Committee were not, technically, "an office"; but the Committee were to be considered as really a committee of the Legislature, then it may not under the Organic Act be vested with the power to vote the stock of these corporations (nor to perform the other administrative acts attempted to be vested in the "Board of Control" with reference to the Bank); since these are quasi-public corporations, owned practically outright by the Government, administering public funds raised by taxation and invested by the Government in the purchase of their capital stock, as convenient means or agencies for accomplishing public governmental purposes.

Therefore, appointment of their officials,—directors and corporate officers,—is, in effect, the appointment of "civil officers" of the Government; and is a function of the Governor General which could not be exercised by the Legislature itself; and which therefore it cannot delegate to a legislative committee. Its committee cannot do more than could the Legislature itself.

Confer,

State v. *Stanley, supra,* 66 No. Car. 60, 63–68; 8 Am. Rep. 488, 489–493.[1]

Howerton v. *Tate, supra,* 68 No. Car. 546, 548.[1]

A.—THESE ACTS OF THE LEGISLATURE DIRECTING THE PURCHASE BY THE PHILIPPINE GOVERNMENT OF A MAJORITY OF THE STOCK OF THESE CORPORATIONS (PHILIPPINE NATIONAL BANK AND NATIONAL COAL COMPANY) CAN ONLY BE SUSTAINED BECAUSE THEY ARE FOR PUBLIC PURPOSES.

Otherwise the Philippine Government would have no power to invest its public funds raised by taxation in the capital stock of these corporations.

Cooley on Taxation (4th Ed.), Secs. 174 and 175.

B.—SINCE, THEN, THE PHILIPPINE GOVERNMENT HAS CAUSED THESE CORPORATIONS TO BE ORGANIZED FOR PUBLIC PURPOSES, AND, FOR SUCH PUBLIC PURPOSES, HAS INVESTED PUBLIC FUNDS IN THEM, AND CONTROLS THEM THROUGH THE OWNERSHIP OF MORE THAN A MAJORITY OF THE CAPITAL

[1] "On all fours" with the present cases. See foot-note, *infra,* p. 31.

STOCK,—PRACTICALLY ALL OF THE CAPITAL STOCK OF EACH OF THEM, CARRYING ABSOLUTE POWER TO ELECT ALL OF THE DIRECTORS AND THROUGH THEM ALL OF THE OFFICERS AND EMPLOYEES, AND ABSOLUTELY TO DIRECT THE ADMINISTRATION OF THE CORPORATIONS AS COMPLETELY AS THOUGH THEY WERE, DIRECTLY, BUREAUS OF THE GOVERNMENT;—THEY MUST BE TREATED AS PUBLIC AGENCIES,—as convenient means through which the Philippine Government may discharge a portion of its public duties; in the same way that this court sustained the validity of the acts of Congress organizing the original Bank of the United States as a public agency.

McCulloch v. *Maryland*, 4 Wheat. 316, 408–424.

These corporations, being thus chartered for public purposes, financed with public moneys from the Insular Treasury, and wholly controlled by the Government itself, are, really, in effect, public,—or *quasi*-public,—corporations, within the meaning of Chief Justice Marshall's distinction in the Dartmouth College case:

> "The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government, created for its purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the legislature. The incorporating act neither gives nor prevents this control. Neither, in reason, can the incorporating act change the character of a private eleemosynary institution."
>
> *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 638–639.

The Panama Railroad is none the less a government agency than the Panama Canal; although the former is administered through the means of a government owned corporation, whereas the latter is administered directly by the Government.

IT IS WHOLLY IMMATERIAL THAT, BY ADOPTING THE CORPORATE FORM OF ORGANIZATION FOR THESE AGENCIES, THE GOVERNMENT HAS WAIVED ITS IMMUNITY FROM SUIT, AS TO THEIR CONTRACTS AND TORTS; and, in that respect, has put itself on the same footing as a private citizen in relation to

their dealings with third parties. *That is the principle of the cases cited on pages* 19 to 22 *of Petitioners' brief* in Case No. 564, viz:—*Bank of the United States* v. *Planters' Bank of Georgia*, 9 Wheat. 904, 907–908; *Curran* v. *Arkansas*, 15 How. 304, 308–309; *Marshall* v. *Railroad Co.*, 92 N. C. 322, 327–328; and *National Coal Co.* v. *Collector of International Revenue*, 46 Phil Rep. 583.

> "If the Government were asserting any rights with respect to the conduct of the corporation's affairs, its contracts or its torts, then its rights, duties, and privileges would be no greater than those of any other stockholder. (*Bank of the United States* v. *Planters' Bank*, 9 Wheat. 904, 907). But here * * * *since these dividends constituted 'public money' applicable to public purposes only, the Government in collecting them was acting in its governmental capacity* as much as if it were collecting taxes, such as those with which, no doubt, the stock which produced the dividends was purchased." (*Italics ours.*)
>
> *Chesapeake & Delaware Canal Co.* v. *United States*, 250 U. S. 123, 126.

Paraphrasing the words of this court, italicized above, may we not say that "since the shares of the National Coal Company and of the National Bank owned by the Philippine Government are public property (they were purchased with 'public money applicable to public purposes only'), the Government in voting them, or in administering these corporations through them, is acting 'in its governmental capacity' "; as much as in administering the City of Manila, or in appointing its city officials?

C.—THESE CORPORATIONS, THEN, ARE DISCHARGING A PORTION OF THE DUTIES OF THE GOVERNMENT, and have been endowed with their charters for public purposes. Their officers are, therefore, *pro tanto* discharging public duties; and, necessarily, of an executive nature.

D.—THE POWER OF APPOINTMENT OF THESE OFFICERS OF THOSE CORPORATIONS, so discharging public executive duties,—whether corporate directors, president, vice president, general manager, assistant general manager, chief of the auditing department, or other officers, employees or agents of the Bank, is, therefore, an executive power.

E.—BEING AN EXECUTIVE POWER,—IN EFFECT, A POWER OF APPOINTMENT TO CIVIL OFFICE,—SUCH APPOINTING POWER CAN ONLY BE EXERCISED BY THE EXECUTIVE.

Confer, Point II, *ante*, pp. 22–24, and authorities there cited.

SEE ALSO,

State v. *Stanley*, *supra*, 66 No. Car. 60, 63–68; 8 Am. Rep. 488, 489–493.

Howerton v. *Tate*, *supra*, 68 No. Car. 546, 548.

It is not a legislative power; and, therefore, cannot be exercised by the Legislature.

1. The Legislature of the Philippine Islands possesses legislative power only (except in the few instances otherwise expressly provided by the Organic Act).

> "general legislative power, except as otherwise herein provided, is hereby granted to the Philippine Legislature, * * *." (Sec. 8, Organic Act, 39 Stat. 547.)

> "That general legislative powers in the Philippines, except as herein otherwise provided, shall be vested in a legislature * * * designated 'The Philippine Legislature'; * * *." (*ib.* Sec. 12, 39 Stat. 548.) [1]

The only powers not strictly legislative in character granted to the Legislature are:

(*a*) Each house to appoint its presiding officer, clerk and sergeant at arms, "and such other officers and assistants as may be required" (Sec. 18; 39 Stat. 550);

(*b*) To choose, triennially, two Resident Commissioners to the United States (Sec. 20; 39 Stat. 552); and

(*c*) (The Senate alone) to approve or disapprove the Governor General's appointments of civil officers to be appointed "by and with the consent of the Philippine Senate" (Sec. 21, *supra;* 39 Stat. 552).

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[1] The purpose of Congress to distribute the powers of Government in the Philippines between the three departments, executive, legislative, and judicial, is beyond peradventure. The Organic Act vests "supreme executive power" in the Governor General (Sec. 21); grants "general legislative power" to the Legislature (Secs. 8, 12); and provides that the Insular Supreme Court and the Courts of First Instance shall possess and exercise jurisdiction (the judicial power) as theretofore provided and such additional jurisdiction as shall "hereafter" be prescribed by law (Sec. 26).

With these three exceptions, the powers granted the Legislature are purely legislative in character; that is, the power "to make laws, and to alter and repeal them" (Opinion of the Insular Supreme Court, Case 564, R. 80; quoting *Story, Const. Lim.* (8th Ed.) p. 183).

F.—NEITHER CAN IT BE EXERCISED BY A COMMITTEE OF THE LEGISLATURE, WHICH MAY ONLY EXERCISE SUCH POWERS AS THE LEGISLATURE ITSELF COULD EXERCISE.

Executive duties cannot be given them under the guise of additional duties as members of the Legislature; because such executive duties are not "germane to the" (legislative) "offices already held by them."

> *Shoemaker* v. *United States*, 147 U. S. 282, 301.
> *State* v. *Stanley, supra*, 66 No. Car. 60, 63–68; 8 Am. Rep. 488, 489–493.
> *Howerton* v. *Tate, supra*, 68 No. Car. 546, 548.

> "The General Assembly not only passed an act—that is, made a law—but it made a joint committee of the Senate and the House as its executive agent to carry out the law. *This is a clear and conspicuous instance of an attempt by the General Assembly to confer executive power on a collection of its own members.*" (*Italics ours.*)
> *Stockman* v. *Leddy*, 55 Colo. 24; 129 Pac. 220, 223; Anno. Cas. 1916–B, 1052, 1055.

> "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to governments, whether state or national, are divided into three grand departments, of the executive, the legislative, and the judicial. * * * It is also essential to the successful working of the system, that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriated to its own department and no other."
>
> *Kilbourn* v. *Thompson*, 103 U. S. 164, 190.

1. It is of but little significance that Congress itself may in a few instances have trespassed on the executive power by itself naming (or authorizing its own officers to name) from its own body members of boards intended to exercise executive powers somewhat analogous to those attempted to be given by the Philippine Legislature to this "Committee" and "Board of Control." (E.g., *Smithsonian Institution*, 9 Stat. 102, 103, Rev. Stats., Title 73; *National Forest Reservation Commission*, 36 Stat., 961, 962; and *Public Buildings Commission*, 40 Stat. 1269; cited on pages 11, 25–26 of Petitioners' Brief in Case 564).

Rather is it significant that the industry of counsel for the petitioners has succeeded in finding so few instances where Congress has thus ventured.

> "In the use of Congressional legislation to support or change a particular construction of the Constitution by acquiescence, its weight for the purpose must depend not only upon the nature of the question, but also upon the attitude of the executive and judicial branches of the Government, as well as upon the number of instances in the execution of the law in which opportunity for objection in the courts or elsewhere is afforded. When instances which actually involve the question are rare, or have not in fact occurred, the weight of the mere presence of acts on the statute book for a considerable time, as showing general acquiescence in the legislative assertion of a questioned power, is minimized."
>
> *Myers* v. *United States*, *supra*, 272 U. S. 52, 170–171.

None of the Acts cited by petitioners have ever, as to this feature, been tested in the Courts.

POINT V.

It follows that, even if the membership of the President of the Senate and the Speaker of the House in the "Committee" and the "Board of Control" were not to be considered as, technically, an "office," yet the enactment of these statutes by the Legislature, so attempting to fill the membership in the "Committee" and "Board of Control" by the designation of its own presiding officers, amounted to an invasion by the legislative branch of the domain of the executive. It was a clear attempt to confer executive power on members of the Legislature.

Confer:

COLORADO.

Stockman v. *Leddy*, 55 Colo. 24; 129 Pac. 220, 223; Anno Cas. 1916–B., 1052, 1055.

INDIANA.

State ex rel Jameson v. *Denny*, 118 Ind. 382; 21 N. E. 252, 254 *et seq.*; 4 L. R. A. 79, 81, 80–83.
State ex rel Holt v. *Denny*, 118 Ind. 449; 21 N. E. 274, 277, *et seq.*

KENTUCKY.

Taylor v. *Commonwealth*, 3 J. J. Marshall (26 Ky.) 401 (ROBERTSON, CH. J.; 1830).
Pratt v. *Breckinridge*, 112 Ky. 1; 65 S. W. 136, 137 *et seq.*
Sibert v. *Garrett*, 197 Ky. 17; 246 S. W. 455, 456 *et seq.*

OHIO.

State v. *Kennon*, 7 Ohio 546, 553 *et seq.*

FLORIDA.

Re Members of Legislature, 49 Fla. 269; 39 Sou. 63, 64.

NORTH CAROLINA.

State of North Carolina v. *Stanley*,[1] *supra*, 66 N. C. 59, 63 *et seq.*, particularly 66–68; 8 Am. Rep. 488, 489–493.
Howerton v. *Tate*, *supra*, 68 N. C., 546, 548.[1]

UTAH.

McCornick v. *Pratt*, 8 Utah 294; 30 Pac. 1091, 1093–1094; 17 L. R. A. 243, 249.

Decisions to the contrary in a few States,—e. g., *Biggs* v. *McBride*, 17 Oregon, 640, cited by Petitioners (Case No. 564, Petitioners' Brief, pp. 51–52), are based upon the theory prevailing in those States that the legislative power includes the power of appointment to office; which is contrary to the Federal law as established by this court in the *Myers* case.

Myers v. *United States*, *supra*, 272 U. S. 52, 106 *et seq.*

[1] "On all fours" with the present cases. Holds invalid a provision of the North Carolina Act of April 6, 1871, "authorizing and empowering the President of the Senate and Speaker of the House of Representatives to appoint proxies and directors on the part of the State in all corporations in which the State has an interest." (p. 60).

POINT VI.

Failure of the Congress to annul invalid portions of these Insular acts does not amount to Congressional ratification.

Nor to amendment thereby of the Organic Act; nor to its obsolescence.

The power reserved to Congress by Section 19 of the Organic Act by the provision that

> "all laws enacted by the Philippine Legislature shall be reported to the Congress of the United States, which hereby reserves the power and authority to annul the same" (39 Stat. 551; *supra*, p. 12),

is, primarily, a reservation of *legislative power;* not of judicial power.

It is but an express statement of the reserve power which Congress would have had, even without such express statement of it, under its constitutional plenary power to legislate for the territories. It is a reserved power in Congress to annul even perfectly valid acts of its agent, the Insular Legislature.

Upon the *judicial* question whether an Insular statute contravenes a provision of the Organic Act, long continued acquiescence by the Congress may, it is true, have some persuasive weight; but it cannot bind the courts, if clearly erroneous.

There is nothing to the contrary in either of the decisions of this court cited on pages 53 to 56 of Petitioners Brief here in Case No. 564 (*Clinton* v. *Englebrecht*, 13 Wall. 434, 445–446; *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362, 370–371; *Tiaco* v. *Forbes*, 228 U. S. 549, 557–558).

The Organic Act, and other statutes of Congress, cannot be thus amended by indirection or inattention.

Expressions in some judicial opinions, apparently giving broader effect to the failure of Congress to act, must be considered as limited by the facts in those cases. For instance, the language of the Circuit Court of Appeals, First Circuit, in the case of *Fajardo Sugar Company* v. *Holcomb, Auditor*, 16 F. (2d) 92, ANDERSON J., November 23, 1926, quoted and relied upon by petitioner (Petitioner's Brief, Case 564, pp. 56–58) has been limited by the same court in its later opinion, April

11, 1927, also written by MR. JUSTICE ANDERSON, in which that court says:

> "This failure to annul has some, though not controlling, weight. But we are not prepared to adopt the appellants' broad contention that, 'The Legislature of Porto Rico is an agent of Congress' and that therefore the 'Act has now become in effect an act of Congress itself.' This proposition goes too far. Failure to annul is not the full equivalent of adoption. None of the cases cited and relied upon support the appellants' broad contention as to agency. *Tiaco* v. *Forbes*, 228 U. S. 549, 557–558; *Porto Rico* v. *Am. etc. R. Co.*, 254 Fed. 369, 377; *Camunas* v. *P. R. Ry., etc. Co.*, 272 Fed. 924, 931, and cases cited."
>
> *Gallardo, Treasurer of Porto Rico*, v. *Porto Rico Railway Light & Power Co.*, 18 F. (2d) 918, 923; ANDERSON, J., April 11, 1927.

It is believed that the rule, as thus stated by the Circuit Court of Appeals for the First Circuit, conforms to the decisions of this court in the *Englebrecht* and *Tiaco-Forbes* cases (*Clinton* v. *Englebrecht, supra*, 13 Wall. 434, 445–446; *Tiaco* v. *Forbes, supra*, 228 U. S. 549, 557–558).

Compare, also, what was said by this court as above quoted (*ante*, p. 30) in the *Myers* case, as to the interpretative value even of Congressional enactments implying an assertion of doubtful legislative power, when untested in the courts.

Myers v. *United States, supra, 272* U.S. 52, 170-171.

In the present case the Philippine acts here in question, being clearly in violation of the Organic Act enacted by Congress for the government of these islands, are not validated by the failure of Congress actively to annul them.

To hold otherwise would be to say that an act of Congress may be amended or annulled by inattention or indirection;—by its disregard by the Insular Legislature, coupled with the mere failure of Congress to act.

In view of the increase of legislation in the territories and territorial possessions of the United States and in view also of the vast number of bills that are presented to Congress for its consideration, which are increasing year by year, and the recent tremendous increase generally in the business of Congress itself, the reason for the judiciary to give weight to such

Congressional inaction is gradually decreasing day by day. It is, therefore, not surprising that petitioners have been unable to cite any case where this court has held valid an act of a territorial or insular legislature in conflict with an Organic Act, because of the failure of Congress to annul such act; and no such case can be found.

The establishment of the rule in this respect contended for by the petitioners would, under present conditions, amount to permitting territorial legislatures and the legislatures of our insular possessions to amend acts of Congress, merely because Congress by reason of its vast duties has not had time or opportunity to give consideration to such territorial or insular legislation.

CONCLUSION.

It is respectfully submitted that the judgments of the Insular Supreme Court are in harmony with the controlling decisions of this court hereinbefore cited, and necessarily resulted from the principles of those decisions; that no new Federal question of substance is here presented not already decided by this court; and that, therefore, important as these cases are, administratively, to the people and government of the Philippine Islands, no occasion is here presented for the exercise of the extraordinary jurisdiction of this court to review them by certiorari.

Respectfully submitted.

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APPENDICES

APPENDIX A.—Executive Order, June 21, 1901, Organizing Civil Government.

APPENDIX B.—The Attorney General's Opinion.

APPENDIX C.—The Judge Advocate General's Opinion.

APPENDIX A.

EXECUTIVE ORDER ORGANIZING CIVIL GOVERNMENT

WAR DEPARTMENT,
Washington, June 21, 1901.

On and after the fourth day of July, nineteen hundred and one, until it shall be otherwise ordered, the President of the Philippine Commission will exercise the executive authority in all civil affairs in the government of the Philippine Islands heretofore exercised in such affairs by the Military Governor of the Philippines, and to that end the Hon. William H. Taft, President of the said Commission, is hereby appointed Civil Governor of the Philippine Islands. Such executive authority will be exercised under, and in conformity to, the instructions to the Philippine Commissioners, dated April seventh, nineteen hundred, and subject to the approval and control of the Secretary of War of the United States. The municipal and provincial civil governments, which have been, or shall hereafter be, established in said islands, and all persons performing duties appertaining to the offices of civil government in said islands, will, in respect of such duties, report to the said Civil Governor.

The power to appoint civil officers, heretofore vested in the Philippine Commission, or in the Military Governor, will be exercised by the Civil Governor, with the advice and consent of the Commission.

The Military Governor of the Philippines is hereby relieved from the performance, on and after the fourth day of July, of the civil duties hereinbefore described, but his authority will continue to be exercised as heretofore, in those districts in which insurrection against the authority of the United States continues to exist, or in which public order is not sufficiently restored to enable provincial civil governments to be established under the instructions to the Commission dated April seventh, nineteen hundred.

By the President:

ELIHU ROOT,
Secretary of War.

APPENDIX B.

ATTORNEY GENERAL'S OPINION.

DEPARTMENT OF JUSTICE
WASHINGTON

September 22, 1926.

Sir:

I have the honor to acknowledge receipt of your letter of April 20, 1926, requesting my opinion of the validity of the Board of Control created by the Philippine Legislature.

On February 4, 1916, by Act No. 2612, the Philippine Legislature created the Philippine National Bank, of which the Philippine Government was to purchase a majority of the shares of stock, appropriated public moneys for that purpose, and authorized the sale of the remaining stock to the public at par. By this Act the Governor-General was vested with exclusive power to vote the stock purchased by the Philippine Government; he was authorized to appoint, with the consent of the upper house of the legislature, the president and the vice-president of the bank, who should constitute two of the seven directors, and he was authorized to perform various other duties and functions in connection with the business of the bank.

On February 20, 1918, by Act No. 2747, the Philippine Legislature amended the Act of 1916, providing that—

"The voting power of all the stock of the National Bank owned and controlled by the Government of the Philippine Islands shall be vested exclusively in a committee consisting of the Governor-General, the President of the Senate, and the Speaker of the House of Representatives."

The authority of the Governor-General to appoint a president and a vice-president of the bank was not affected by this Act.

On January 30, 1921, the Act was again amended by Act No. 2938, which provided that—

"The voting power of all the stock of the National Bank owned and controlled by the Government of the Philippine Islands shall be vested exclusively in a board, the short title of which shall be 'Board of Control,' composed of the Governor-General, the President of the Senate and the Speaker of the House of Representatives."

By amending Section 16 of the earlier Act, the Act of 1921 increased the number of directors from seven to nine, all to be elected by the stockholders; and by amending Section 17 it authorized the board of directors to elect from among their number a president and a vice-president and to appoint a general manager, who should be the chief executive of the bank. The fixing of the

salary of the general manager could be done by the directors only with the approval of the Board of Control, and his appointment and removal by the board of directors could be effected only with the advice and consent of the Board of Control.

Section 22 of the Act as amended provided that—

"The Insular Auditor shall be ex-officio auditor of the National Bank and shall, with the advice and consent of the Board of Control, appoint a representative who shall be chief of the auditing department of the Bank. All the other employees of the department shall be appointed by the Insular Auditor who, with the approval of the Board of Control, shall fix the salaries of the same as well as that of his representative, the chief of the department * * *."

By the same amending Act the approval of the Board of Control is prerequisite to the rediscounting of commercial paper by the bank (Sec. 14), the guaranteeing by the bank of the principal and interest of the bonds of industrial companies (Sec. 45) or the purchasing of such bonds. (Sec. 45.)

The Legislature has also created a National Coal Company (Act No. 2705); a National Petroleum Company (Act No. 2814); a National Development Company (Act No. 2849); a National Cement Company (Act No. 2855), and a National Iron Company (Act No. 2862). The aggregate authorized capital stock of these companies is 54,500,000 pesos. As to each of these companies the legislature directed that a majority of the shares of stock should be purchased by the Governor-General on behalf of the Philippine Government, and appropriated public funds for this purpose. As to each of these companies the Act authorizing its creation provided that the power to vote the shares held by the Philippine Government should be vested exclusively in a committee consisting of the Governor-General, the President of the Senate and the Speaker of the House of Representatives.

The validity of the legislation involved depends upon the construction which is to be given to the Act of Congress establishing the present form of government in the Philippine Islands, the Act of August 29, 1916, c. 416, 39 Stat. 545, otherwise known as the Philippine Organic Act.

The pertinent provisions of that Act are as follows:—

"SEC. 8. That general legislative power, except as otherwise herein provided, is hereby granted to the Philippine Legislature, authorized by this Act."

"SEC. 18. * * * No senator or representative shall, during the time for which he may have been elected, be eligible to any

office the election to which is vested in the legislature, nor shall be appointed to any office of trust or profit which shall have been created or the emoluments of which shall have been increased during such term."

"SEC. 21. That the supreme executive power shall be vested in an executive officer, whose official title shall be 'The Governor-General of the Philippine Islands.' * * * He shall, unless otherwise herein provided, appoint, by and with the consent of the Philippine Senate, such officers as may now be appointed by the Governor-General, or such as he is authorized by this Act to appoint, or whom he may hereafter be authorized by law to appoint, but appointments made while the senate is not in session shall be effective either until disapproval or until the next adjournment of the senate. He shall have general supervision and control of all of the departments and bureaus of the government in the Philippine Islands as far as is not inconsistent with the provisions of this Act * * *."

"SEC. 22. * * * all executive functions of the government must be directly under the Governor-General or within one of the executive departments under the supervision and control of the Governor-General."

Section 24 provides for the appointment of an auditor and a deputy auditor by the President of the United States, outlines the duties of these officers, and declares that "The office of the auditor shall be under the general supervision of the Governor-General and shall consist of the auditor and deputy auditor and such necessary assistants as may be prescribed by law."

Section 18, quoted above, clearly provides that the legislature may not elect its own members to offices outside of the legislature itself. When Congress enacted this provision it was evidently thinking primarily of the two Resident Commissioners to the United States, but the section under consideration is not restricted to those officers. The legislature may not elect one of its own members to a position, *ex-officio* or otherwise, if that position is an office and if the duties of that office are not strictly legislative in character or essential in order to enable the legislature itself to exercise its legitimate functions. Obviously membership in the Board of Control is an office, for it is a public station, permanent in character, created by law, the incidents and duties of which are prescribed by law. *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 520. The position is a public office. It comes within Article 401 of the Penal Code of the Philippines, which declares that "For the purpose of applying the provisions of this and the

preceding titles of this book, any person who, by direct provision of law, by popular election, or appointment by competent authority, shall take part in the performance of duties in the public service shall be deemed a public officer." The position is analogous to that involved in *Clark* v. *Stanley*, 66 N. C. 59, where the legislature authorized the president of the senate and the speaker of the house of representatives to appoint proxies and directors for the State in all corporations in which the State was a stockholder. In holding the legislation unconstitutional, the court said that "A public office is an agency for the State, and the person whose duty it is to perform this agency is a public officer." See also *In re Members of the Legislature*, 49 Fla. 269, 39 So. 63; *People* v. *Sanderson*, 30 Cal. 160; and the opinion which Attorney General Stone rendered to the Secretary of War on April 30, 1924 (34 Ops. A. G. 287), concerning the Philippine Independence Commission. There is nothing in the nature of the duties to be performed by the Board of Control which by necessary implication takes such an office out of the express terms of the Philippine Organic Act. And it cannot be said that the office is simply honorary and for that reason the fundamental law of the Islands should not be so construed as to apply to it. Two members of the legislature constitute a majority of a board which controls active business corporations capitalized at over fifty-four million pesos. Clearly Section 18 of the Act of Congress applies to such offices. Even if the legislature may select members of the Board of Control, it may not place any senator or representative upon that board.

The question whether the legislature possesses any power whatever to select members of the board must be solved by a consideration of other provisions of the Philippine Organic Act.

That Act is unquestionably modeled on the Constitution of the United States in distributing governmental powers among legislative, executive and judicial authorities and in impliedly prohibiting one department of government to exercise powers which have been entrusted only to another department. It is true that under both fundamental laws the distribution of powers is not strictly logical; that, for example, the President and the Governor-General exercise power which is legislative in its nature when they veto legislation, and that the Senate of the United States and the Philippine Senate exercise power of an administrative nature when they consider appointments to office. But such exceptions, which are expressly recognized in the Constitution of the United States and in the Philippine Organic Act, do not lessen the positiveness of the rule in unexcepted cases. It is a funda-

mental principle that in the absence of an express exception to the general rule governmental powers cannot be considered as overlapping. The legislature may not exercise any of the powers which have been granted to the executive department of government.

As the Supreme Court of the United States said in *Kilbourn* v. *Thompson*, 103 U. S. 168, 190, 191—

> "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other. To these general propositions there are in the Constitution of the United States some important exceptions. * * *
>
> "In the main, however, that instrument, the model on which are constructed the fundamental law of the States, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another."

This point was also discussed at length by James Madison in the First Congress. Annals of Congress, I, 463.

The Philippine Organic Act, in Section 22, provides that "all executive functions of the government must be directly under the Governor-General or within one of the executive departments under the supervision and control of the Governor-General." Madison, in the speech just cited, declared "I conceive that if any power whatsoever is in its nature executive, it is the power of

appointing, overseeing and controlling those who execute the laws." Madison unquestionably understood correctly the Constitution which he did so much in framing and which served as a model for the fundamental law of the Philippine Islands. The power of appointment of public officials must rest with the executive department of the United States and with the executive department of the Philippine Government.

Apparently there has been no decision directly upon this point by the Supreme Court of the United States. In *United States* v. *Ferreira*, 13 How. 40, 51, however, that Court declared emphatically that Congress cannot by law designate the persons to fill the offices which it creates. That point was not necessarily involved in the case then before the Court, but the Court left no possible doubt as to its position. As expressed by the Supreme Court of North Carolina in *People* v. *Bledsoe*, 68 N. C. 457, 460, "Creating an office is an act of legislation. Filling an office is an executive act." The rule stated by the Supreme Court of the United States in *United States* v. *Ferreira* would equally apply to acts of the Philippine Legislature designating its own officials to fill positions upon the Board of Control.

As you have not requested my advice concerning the validity of the provisions of Act No. 2938 relating to the Insular Auditor, I express no opinion thereon. In *Shoemaker* v. *United States*, 147 U. S. 282, 300, 301, it was held that Congress could impose upon officers of the United States additional duties germane to the offices already held by them without calling for fresh appointments by the appropriate executive official. Whether this rule would apply to the Insular Auditor who is under the general supervision of the Governor-General but has not been expressly placed under his "control," it is not necessary to decide at the present time.

The acts of the Philippine Legislature which have been considered are clearly invalid in so far as they provide that the President of the Senate and the Speaker of the House of Representatives shall be members of the board or committee of control. The statutes make them not only members of the board, but a majority of it, having power to dictate its decisions. Their membership is an inseparable feature of the board. For this reason, as they cannot serve upon the board, the provisions of the statutes which create that board and enumerate its powers must be treated as nullities.

Of course, the remaining portions of the statutes are not affected by the invalidity of the portions under consideration. The present directors of those corporations are *de facto* directors

until others are chosen. The legislature may possibly create another board of control by a statute which recognizes that the duties of such a board are executive, subject to the provisions of the Organic Act relating to executive functions. But unless and until the legislature creates such an executive board, any duties of an executive nature which arise may be performed as in other cases not specifically provided for by law. The supreme executive power is vested in the Governor-General.

Respectfully,

(Sgd.) WILLIAM J. DONOVAN,
Acting Attorney General.

The Honorable,
The Secretary of War.

APPENDIX C.

WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

Civil Affairs
Stallings—lmc

APRIL 16TH, 1926.

Memorandum for the Chief of the Bureau of Insular Affairs.

Subject: Validity of Boards of Control Appointed by the Philippine Legislature.

1. My opinion is desired as to the legality of a "Board of Control," or "Committee," composed of the Governor-General, President of the Senate, and Speaker of the House of Representatives, appointed by the Philippine Legislature and vested with the exclusive right to vote the stock owned by the Philippine Government in certain corporations created by the Philippine Legislature.

2. Act No. 2612 passed by the Philippine Legislature on Februray 4, 1916, created a corporation known as the Philippine National Bank with an authorized capital of twenty million pesos, divided into two hundred thousand shares of a par value of one hundred pesos each (Sec. 3) of which shares the Philippine Government was to purchase one hundred and one thousand (Sec. 4), made appropriation of public money to pay for same (Sec. 5), and provided that the remaining stock should be offered to the public at par. The Governor-General was vested exclusively with the voting power of said stock (Sec. 5). He was authorized by and with the consent of the Upper House of the Philippine Legislature to appoint the president and vice-president of the corporation (Sec. 21) and to perform various other duties and functions in connection with the business of the bank, not important here.

On February 20, 1918, the Philippine Legislature passed Act No. 2747, amending Act No. 2612, and provided in Section 4 thereof:

> "The voting power of all the stock of the National Bank owned and controlled by the Government of the Philippine slands shall be vested 'exclusively in a committee consisting of the Governor-General, the President of the Senate and the Speaker of the House of Representatives.'"

This section took from the Governor-General the exclusive voting power theretofore granted and vested it in a committee of three officers, two of them belonging to the Legislative branch of the Government, but Section 18 continued the authority of the Governor-General to appoint the president and vice-president of the bank.

The statute was again amended by Act 2938, passed January 30, 1921, whereby the capital stock was increased to fifty million pesos (Sec. 2) but at no time were the shares held by the public to equal or exceed the number held by the Government, and in Section 4 it was provided:

> "The voting power of all the stock of the National Bank owned and controlled by the Government of the Philippine Islands shall be vested exclusively in a board, the short title of which shall be 'Board of Control,' composed of the Governor-General, the President of the Senate, and the Speaker of the House of Representatives."

By Section 16 of that Act the Board of Directors was increased from five to nine, all to be elected by the stockholders, which Board of Directors was by Section 17 authorized to elect from among their number a president and vice-president and to appoint, with the advice and consent of the Board of Control, a general manager who is chief executive of the bank. It is further provided (Section 22):

> "The Insular Auditor shall be ex-officio auditor of the National Bank and shall, with the advice and consent of the Board of Control appoint a representative who shall be chief of the auditing department of the Bank. All the other employees of the department shall be appointed by the Insular Auditor who, with the approval of the Board of Control, shall fix the salaries of the same as well as that of his representative, the chief of the Department. * * *"

And Section 44 provides:

> "* * * the Secretary of Finance, at the request of the board of directors of the Bank duly approved by the Board of Control, whenever in his judgment the general interests of the country require it, shall be authorized to suspend for such period as may be necessary the requirement of maintaining the proportion of the reserve specified in this Act. * * *"

In addition, the establishment of various foreign agencies, the rediscounting of commercial paper, and the removal of the general manager cannot be accomplished except with the advice and consent of the Board of Control. Its approval is also required in fixing the salary of the general manager and assistant general manager, in the appointment of employees of the auditing department, and in fixing the amount of their salaries; in guaranteeing by the bank of the principal and interest of the bonds of industrial companies or the purchase of their bonds, and in the payment of additional compensation to the president or vice-president who temporarily perform the duties of other employees.

The Philippine Legislature also created the following corporations, directed that stock therein be purchased and appropriated public funds to be used to purchase, in most instances, at least fifty-one per cent (51%) of the capital stock:

Act No.	*Name*	*Authorized Capital*
2705	National Coal Company	3,000,000 pesos
2814	National Petroleum Company.....	500,000 "
2849	National Development Company.....	50,000,000 "
2855	National Cement Company.....	500,000 "
2862	National Iron Company.....	500,000 "

In each of the said Acts the voting power of the shares of stock held by the government was vested by the legislature exclusively in a committee or board consisting of the Governor-General, the President of the Senate and the Speaker of the House of Representatives.

3. In order to ascertain the validity and legality of the several boards or committees under consideration it is necessary to determine:

A. Whether membership in such board or committees is a civil office, and

B. Whether the legislature has the legal right to make the appointment of members to such board or committee.

These questions will be considered in the order stated.

A

It is said in Black's Constitutional Law (3rd Edition, page 286):

> "* * * It is true that we cannot find in the Constitution an express grant of power to Congress to grant charters of incorporation. But if a bank, a railroad, a

telegraph company, or any other kind of corporation is a means or agency needed by Congress in the exercise of its admitted powers, or conducive to their due execution, and plainly adapted to the accomplishment of that end, then Congress has power, under this clause of the Constitution, to incorporate it."

The Organic Act is silent on the right of the legislature to create corporations. Such right is not here questioned. A corporation necessarily acts through its officers and agents and in the Philippine National Bank the Board of Control being vested with the exclusive power to vote the stock held by the Government, which was required to be a controlling amount, became an agency of the Government, which could always elect a majority of the directors of the Bank, and thus control its action.

It is clearly apparent that this Board of Control not only was the proxy for the Government to vote its stock, but on account of its duties was, in fact, as its name implies, a *"Board of Control"* with power to determine the policy of this bank, in which fifty-one per cent of the capital stock was owned by the Government and paid for with public money.

In the case of *Clark* vs. *Stanley* (66 N. C. 60), the legislature of North Carolina passed an Act giving to the President of the Senate and Speaker of the House of Representatives the power to appoint "all proxies and directors in all corporations in which the State has an interest," and the question arose as to whether in such appointment the President and Speaker would be filling a public office and be *public officers*. The court said:

> "A public office is an agency for the State, and the person whose duty it is to perform this agency is a public officer. This we consider to be the true definition of a public officer in its original, broad sense. The essence of it is the duty of performing an agency, that is, of doing some act or acts or series of acts for the State.
>
> "Public officers are usually required to take an oath, and usually a salary or fees are annexed to the office, in which case it is an office 'coupled with an interest.' But the oath and the salary or fees are mere incidents and constitute no part of the office. Where no salary or fees are annexed to the office, it is a naked office—honorary—and is supposed to be accepted merely for the public good. This definition also excludes the idea that a public office must have continuance. It can make no difference whether there be but one act or a series of acts to be done; whether

the office expires as soon as the one act is done or is to be held for years or during good behavior. This incident, however, need not be considered, for here is continuance; the duty is imposed upon the President of the Senate and the Speaker of the House of Representatives for all time to come."

See also *State* vs. *Hocker*, 39 Fla. 477; 63 Am. S. Rep. 174, cases cited; *Houston* vs. *Tate*, 38 N. C. 377.

A somewhat similar question arose in Florida, *In re Members of Legislature* (39 Sou. Rep. 63). In that case the legislature passed an Act creating a board of control which was charged with the duty of locating and continuously and permanently managing State institutions of learning, and the Governor, who was authorized to make the appointments, asked the opinion of the State Supreme Court as to whether members of the legislature at the time the statute was passed could be appointed as members of the board, in view of the constitutional provision that "no senator or member of the House of Representatives shall during the time for which he was elected be appointed or elected to any civil office under the Constitution of this State, that has been created or the emoluments of which shall have been increased during such time." The court said it was first necessary to determine whether members of such board would be civil officers, and in passing on that point held:

"Members of a board of control created by law, who are charged with the duty of locating and continuously and permanently controlling and managing State institutions of learning, whose terms of office are definitely fixed, with provision for removal and appointment by the Governor to fill vacancies on such board, and the office being continuous and permanent and remaining to be filled, though the incumbents may die or resign, are civil officers, under the Constitution of this State. The fact that there is no salary or emolument, like an oath of office, is an incident to office merely, and not a necessary element in the determination of its character."

Mechem, in his work on Public Office and Officers, Edition of 1890, Section 16, declares:

"An office whose duties and functions require the exercise of discretion, judgment, experience, is an office of trust, and it is not necessary that the officer should have

the handling of public money or property, or the care and oversight of some pecuniary interest of the Government."

Article 401 of the Penal Code of the Philippines provides:

> "For the purpose of applying the provisions of this and of the preceding titles of this book, any person who, by direct provision of law, by popular election, or appointment by competent authority, shall take part in the performance of duties in the public service shall be deemed a public officer."

The functions of these various boards and committees as set out in the statutes creating them clearly show that they can be properly performed only by men of experience, discretion, and judgment, and therefore are positions of trust. "An office embraces the idea of tenure, duration, emoluments and duties, and these ideas cannot be separated, and each considered separately. All taken together constitute the office." *Kendall* vs. *Raybould*, 44 Pac. (Utah) 1034; *U. S.* vs. *McCrory*, 91 Fed. 295; "Words and Phrases," title, "Office."

From the foregoing I am of opinion that the "Boards of Control" and "Committees" appointed by the legislature in the statutes referred to are civil offices, and that the members thereof are public officers within the meaning of the Organic Act (39 Stat. 454).

B

The Philippine Organic Act, Section 21, provides:

> "That the supreme executive power shall be vested in an executive officer whose official title shall be 'The Governor General of the Philippine Islands. * * * He shall, unless otherwise herein provided, appoint by and with the advice and consent of the Philippine Senate, such officers as may now be appointed by the Governor General, or such as he is authorized by this Act to appoint, or whom he may hereafter be authorized by law to appoint. * * * He shall have general supervision and control of all of the departments and bureaus of the government in the Philippine Islands as far as not inconsistent with this Act. * * *"

It also provides in Section 22:

> "* * * Provided, that *all* executive functions of the government *must be* directly under the Governor General or within one of the executive departments under the supervision and control of the Governor General." (Italics supplied.)

Section 8 of the Organic Act is as follows:

> "That general legislative power, except as otherwise herein provided is hereby granted to the Philippine Legisture, authorized by this Act."

And the last sentence of Section 18 provides:

> "No senator or representative shall during the time for which he shall have been elected, be eligible to any office the election to which is vested in the legislature. * * *."

The Organic Act separated the power of the Philippine Government into these distinct branches, the executive, the judicial, and legislative, much in the same manner as these powers are distributed in the Federal Government, but put special emphasis on the executive power by expressly providing that *all* executive functions *must be directly* under the Governor-General or within one of the Departments under his control. The distribution of powers is also set forth in Section 15, Philippine Administrative Code, and in Section 80 of that Code, in defining "Particular Powers and Duties of the Governor-General," the following appears:

> "To nominate and appoint officials to *permanent positions in the service of the Government* of the Philippine Islands, with the advice and consent of the Upper House of the Philippine Legislature and not otherwise. (Italics supplied.)

More *permanent positions* can scarcely be imagined than the membership of these boards. They are made to attach to the office of President of the Senate and Speaker of the House of Representatives, and continue so long as these offices exist. No provision is made for removal and it would seem that death is the only event that would cause a vacancy on the board, which would be filled immediately by the election of the legislative suc-

cessor. Of course the provision of the code could be repealed by the Legislature, but if such was the intention it would seem that express terms would have been used, rather than to do so by implication.

It is sometimes difficult to determine to which of the branches of the government certain powers rightfully belong, for the reason that the line of separation is not always clearly defined.

> "The control, administration, and disposition of the property and funds of a state, and the appropriation thereof to the payment of debts, are powers appertaining exclusively to the legislative department." (Black—Constitutional Law, 3rd Ed. 365). But "the legislature can not lawfully usurp any of the functions confided by the constitution to the executive department. Thus, it is the generally accepted doctrine that appointment to office is an executive function which can not be taken away from that department by the legislative branch. * * * The legislature may provide by law for the appointment of all officers not provided for in the constitution, but the appointing power must be lodged somewhere in the executive department." Black, Constitutional Law, 3rd Ed. 86. *Pratt* vs. *Breckinridge*, 65 S.W. (Ky.) 136.

The powers granted to the Governor-General correspond closely to those of the President or the Governor of a State. With reference to appointment to office by the chief executive the general law is stated as follows:

> "With the exception of the small number of offices which are created by the constitution, it is the right and duty of congress to decide what offices shall be created and for what purposes. That is a legislative function. *But when the office is brought into existence, it is for the executive to choose the incumbent.* For, in order to the effective administration, it is necessary that those officers, at least, whose duties are not merely clerical but involve the exercise of discretion and are political in their character, should be in sympathy with the executive for the time being. But at the same time it was deemed necessary to impose a check upon this great power of the President, lest he should be able, by the unrestrained choice of the federal officers, to subvert the whole administrative machinery of government to his own selfish or disloyal purposes. To this end, rejecting unsuitable nominations has

been lodged with the senate." Black—Const. Law, 3rd Ed., 127. (Italics supplied.)

And the same author at page 318, with reference to the "Independence of Executive," says:

> "In regard to the manner of exercising those powers which the constitution specifically confides to the governor, it seems that the legislature, while it cannot, under pretense of regulation, deprive the executive of any branch of his constitutional power, or unduly hinder him in the exercise of it, may yet make rules for his governance in many cases where his authority over the subject is not exclusive of that of the legislature, or where the constitution has not furnished the exclusive rule for the exercise of the power."

The case of *State* vs. *Washburn*, 160 Mo. 680, 90 Am. S. Rep. 403, arose over a statute wherein the legislature provided for the appointment, by the Governor, of three election commissioners in cities having over 100,000 inhabitants, "one of said commissioners to be a member of the leading political party opposed to that to which the chairman and secretary so appointed belong, and shall be chosen from three eligible citizens named by the city central committee of the said leading party politically opposed to that to which the chairman and secretary belong." The Governor appointed three commissioners for Kansas City, one as president, one as secretary and the third from the leading party politically opposed to the other two. He possessed all the qualifications required but was not one who had been nominated by the city central committee of his party, and the question was, did the Governor have the lawful authority to appoint him. The court held:

> "Election commissioners are state officers, and exercise powers properly belonging to the executive department of the state government and must trace their right to office to that department. * * *
>
> "The legislature may pass a statute prescribing the manner in which an appointment to an executive office shall be made but it can not make the appointment itself nor authorize anyone not connected with the executive department to make it. It can not rob the executive of the power of appointment to office by conferring it on an outside unofficial agency of its own appointment. * * *

> Appointment to a governmental office is in itself the exercise of a governmental function and can be exercised only by a governmental officer *and not by the legislature.*" (Italics supplied.)

The case of *Shoemaker* vs. *United States* (147 U. S. 283) is one in which the right of Congress to make appointment of members of a commission was questioned. In that case Congress by the Act of September 27, 1890 (25 Stat. 492), created a commission consisting of the Chief of Engineers of the United States Army, the Engineer Commissioner of the District of Columbia and three citizens to be appointed by the President, by and with the advice of the Senate. They were directed to select the land for Rock Creek Park, appraise the value thereof, and perform certain other duties. The plaintiff brought an action to set aside certain acts of the Commission, based on various grounds, one of which challenged the constitutionality of the said Act of Congress, for the reason that two members of the Commission were appointed by Congress and not by an executive officer or court. In passing on that question the court held:

> "It is within the constitutional power of Congress, in legislating for the creation of a commission charged with public duties, to provide that some members of it shall be appointed by the President, by and with the advice and consent of the Senate, and that other members of it shall consist of officers in the service of the United States, who had been appointed by the President and confirmed by the Senate, when the duties of the new office are germane to those of the offices already held by the latter.
>
> "Congress may increase the duties of an existing office without rendering it necessary that the incumbent should be again nominated, confirmed and appointed."

From the reasoning of the court in deciding that point the inference is clearly to be drawn that had the two members named by Congress not been theretofore appointed by the executive, and the duties required of them on the commission been other than extension of the duties they were by virtue of their offices already performing, the appointment by Congress would have been unauthorized.

Congress unquestionably has the authority to legislate for the Philippine Islands. It may do so without regard to constitutional limitations so long as there is no violation of what is commonly called the "natural rights" of persons. Congress in dealing with

the Philippine Islands may delegate legislative authority to the Philippine legislature (*Dorr* v. *United States*, 195 U. S. 138), which then becomes the agent of Congress (*United States* v. *Heinzmann*, 206 U. S. 370). When so delegated the Philippine legislature can exercise only such legislative power as is granted or which is necessarily incident thereto. The delegation of legislative power in the Organic Act was general except as limited therein, and in defining the power of the Governor-General it was provided that his executive power should be "*supreme*." Obviously Congress meant by that language that he should have complete, unhampered executive authority, otherwise the word *supreme* would not have been used in defining his powers, which was also stressed in Section 22 by the mandatory provision that *all executive functions must be directly under* the Governor-General or within one of the executive departments under his control. Clearly this is a limitation on any legislative action that would limit, curtail, or destroy his executive authority.

The action of the Philippine Legislature in creating the various boards and committees involved in the statutes under examination and definitely naming the personnel of which such boards and committees shall be composed, is in effect creating an office and at the same time filling it. Such action encroaches on the powers of the executive department, destroys the fundamental principle of the separation of powers in government and violates the doctrine that the legislature has the power and authority to make the laws, but the duty of executing them is on the executive department. In my opinion the legislature was without legal authority to make the appointment of the members of the boards and committees as was done in these statutes, and that conclusion makes it unnecessary to determine whether a member of the Philippine Legislature is ineligible for such appointment.

In view of the fact that my conclusions in this matter may seriously affect activities in which the Philippine Government is engaged and which it conducts by these various boards or committees, it is recommended that the papers be transmitted to the Attorney General with a request for his opinion.

J. A. HULL, *Major General,*
The Judge Advocate General.